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Office-Supreme Court, U.
FILED
MAY 12 1959
JAMES R. BROWNING, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

Nos. 518 AND 536

THE ATLANTIC REFINING COMPANY, ET AL.,
Petitioners,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, LONG ISLAND LIGHTING COMPANY and PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Respondents.

TENNESSEE GAS TRANSMISSION COMPANY,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, LONG ISLAND LIGHTING COMPANY and PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS LONG ISLAND LIGHTING COMPANY AND PUBLIC SERVICE ELECTRIC AND GAS COMPANY IN REPLY TO BRIEF OF FEDERAL POWER COMMISSION *AMICUS CURIAE*

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The FPC brief *amicus curiae* is devoted principally to the proposition that the Commission is not obliged, in a producer certificate case, to make a finding that the initial rate is just and reasonable. We have never argued to the contrary, nor has the other respondent herein, nor do we now. This is a straw man.

Although, significantly, the Commission states it is not interested in reversal of the decision below, *Amicus* brief, pp. 11, 105, it argues that there is something exceptional or peculiar about the CATCO case which renders it an unsuitable vehicle for consideration by this Court of the question of the nature of the Commission's responsibilities with respect to initial rates in producer certificate cases. In truth, however, the CATCO case differs from *Texaco-Seaboard, Hope,* and the other cases only in that in CATCO we know, from both the first and second orders, that the Commission believed the public interest was being harmed because of the high initial price; and then we learned from the third (and final) order that the Commission concluded that its responsibility to the public with respect to initial rates would have to give way to the producers' demands, however unreasonable. In the *Texaco-Seaboard* case we are not permitted this plain insight into the Commission's mental processes, but the close parallel of the CATCO facts with the facts in the many other producer certificate cases which respondents have cited in their main briefs, permits only one interpretation: the Commission feels obliged to go along with any price which a producer can persuade a pipeline to pay because the Commission is afraid that if it does not do so, the gas will not be sold. In the CATCO case this course of reasoning is made clear.[1] Perhaps that is

[1] The policy of the Commission of refusing to consider the reasonableness of producer initial rates is illustrated by its very recent decision in *Middle States Petroleum Corp.*, Docket G-14836. There the staff of the FPC showed that the area prices not under suspension ranged from 6 to 14 cents. To determine whether the proposed 17 cent price was excessive the staff sought a subpena for the applicant's financial data relating to the production of the gas involved. The hearing examiner held the requested data to be irrelevant, denied the requested subpena and unconditionally authorized the sale. Pages 6-9 of opinion issued November 21, 1958. The FPC affirmed, adopting the decision of the hearing examiner. Order issued April 13, 1959. Commissioner Connole dissented. Thus,

a good reason for using the CATCO case as the vehicle case for examination of the legality of the policy.

In two other respects we comment on the Commission's brief. We consider the Commission's objections to the second form of order which it used herein and we discuss the question whether the Commission's policies have in fact kept down the price of gas to consumers.

I

1. The FPC attacks its own second order herein which its third order supplanted. Its principal attack is an economic argument: it urges that the second order approach would stifle gas production, because in the absence of established rate-making principles, gas producers would not be able to forecast "prior to drilling" the general area of the rate which the FPC would ultimately find reasonable, *Amicus* brief, p. 15, or whether the allowable return would be adequate to meet their expenses. *Amicus* brief, p. 96. These are spurious arguments for several reasons.

(a) The Commission presently ignores price questions at the certificate stage, but tries to pick them up later in §5 rate investigations. In fact, the starting of §5 proceedings is the Commission's excuse for forgetting price at the earlier stage. But if there is to be a §5 proceeding producers (including wildcatters) can not know what rate the FPC will ultimately find reasonable until its completion. Thus, the producer is as much in the dark about the ultimate rate (and his ability to recover his legitimate expenses) when the inadequate §5 remedy is used as when the perfectly fair second form of CATCO order is used. Similarly, to the extent that the wildcatter's ability to

although the FPC says that evidence of the existence of a market and economic feasibility establish only a *prima facie* case, this evidence in fact is treated as establishing a conclusive case, regardless of any excessiveness of the price.

finance his operations depends on the absence of uncertainty as to the rate he will be permitted to charge, as the Commission contends, *Amicus* brief, p. 96, the wildcatter will be as unable to obtain financing when the Commission uses the §5 route as when it uses the price condition solution.

The nub of the Commission's point is that the second CATCO order would tend to discourage drilling because the producer may worry that the Commission would deal unfairly with him when it gets around to deciding what is a just and reasonable rate. But if there is any substance to this, the producer would be just as worried that the Commission would deal unfairly with him when it fixes just and reasonable rates in the §5 proceeding.

(b) So long as the producer knows before he drills that he will be free to establish the reasonableness of the contract price in the certificate case as an alternative to accepting a price-conditioned certificate, it is difficult to see why he would be dissuaded from drilling by the second form of CATCO order. This is especially true since these certificate cases involve only proven reserves, and thus by the time of the certificate hearings the costs are known.

(c) These arguments of the Commission assume that producers would be significantly influenced in their decisions whether or not to drill in an area by the willingness of the Commission to postpone price considerations to subsequent §5 proceedings. But the fact is that most gas discoveries are made in the course of exploring for oil.[2]

It thus appears that not one of the arguments advanced by the Commission to support its worries about the economic effect of the second CATCO order approach has substance. It may be remarked, further, that these argu-

[2] See *Phillips Petroleum Co.*, Docket G-1148, examiner's opinion issued April 6, 1959, pp. 263-264.

ments are all newly discovered. The Commission did not rely on them in its third CATCO order, or in any of its other opinions in the field.

2. The second claimed defect (*Amicus* brief, p. 93) is that the records contain no rational basis for the price the second order approach would require the producer to accept in lieu of its contract price pending a rate hearing. And consequently its imposition, even though accompanied by safeguards for the producers, might be reversed by the Courts.

(a) The use of "other prices in the area" is thrown out on the ground that they "have not been appraised by the Commission". *Amicus* brief, p. 94. The Commission's brief ignores the fact that such other prices in the area were used by the FPC in *Pan American Petroleum Corp.*, 19 F.P.C. 463, to fix a just and reasonable rate, and are used by the FPC in determining whether to suspend a rate increase, which are both final decisions predicated on such prices;[3] whereas if such prices are used solely for the purpose of fixing the floor under an order of the type under discussion, a decision is not final but only interim, and if the new floor price is wrong, it is not the producers who can suffer but only the consumers.

(b) Moreover, so long as the producer is free as an alternative to accepting a price-conditioned certificate to establish the reasonableness of the contract price in the certificate case, it is difficult to see how it can be injured by use of this form of order. Furthermore, the producer can scarcely be harmed by a regulatory scheme which assures it of receiving a just and reasonable price, the maximum lawful price under the Act.

[3] See our main brief, pp. 43, 50. The pragmatic approach of the *Pan American* case has been cited with approval. See *Forest Oil Corp.* v. *FPC*, 263 F. 2d 622, 625 (5th Cir. 1959).

II

The FPC relies on a comparison between the increase in the consumer price index and the increase in the average price paid by residential consumers for natural gas in the period 1954-1957 and concludes that the increase in the cost of gas to consumers does not reflect adversely on its policies. *Amicus* brief, p. 103. The infirmity of this approach is that the figures do not reflect the spate of increases in the level of initial prices precipitated by the FPC's opening of the flood-gates, in *Natural Gas Pipeline Co. of America*,[4] a December, 1956 decision, in the instant case in 1957, in *Seaboard Oil Co.*,[5] *Hope Natural Gas Co.*,[6] *Superior Oil Co.*[7] and *Texaco-Seaboard*,[8] all of which were 1958 decisions.

Had the FPC included the latest available figures, which do reflect the unfortunate consequences to consumers of the FPC's administration of §7 of the Act, a wholly different light would be shed on the effectiveness of its policies. These figures are set forth and discussed at pp. 16-17 of the Supplemental Brief herein of Respondent Public Service Commission of the State of New York and need not be repeated here. Even the latest figures obscure the fact that low priced natural gas, sold under old contracts, as well as high priced natural gas, sold under more recent contracts, are included in the index of natural gas prices. This "rolling-in" of the low priced gas dilutes substantially the effect on the index of new high prices spurred by the Commission's hands-off policy on initial rates.

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[4] 16 F.P.C. 80.
[5] 19 F.P.C. 416.
[6] 19 F.P.C. 405.
[7] 19 F.P.C. 637.
[8] 20 F.P.C. 264.

By statistical sleight-of-hand the Commission attempts to convey the impression that where a genuine need for a price condition exists, it does not hesitate to impose one. *Amicus* brief, pp. 92-93. It refers to approximately 50 instances. But only in *Signal*[9] out of 4,860 producer filings (*Amicus* brief, p. 93, fn. 39) did it impose a rate condition in a final certificate. Thus, when the Commission states that "Most producer rate conditions have been imposed in granting temporary authorization to begin service • • •", it really means "In every case except one the producer rate conditions which have been imposed have been imposed in granting temporary authorization to begin service. • • •"

The difference between conditions in permanent and temporary certificates is vital. Temporary certificates are granted "without prejudice to such rate or other conditions as may be attached to the issuance of the [permanent] certificate. • • •" FPC Gas Regulations, §157.28, 18 C.F.R. §157.28. Even without the inclusion of a price condition in a temporary certificate, the Commission may impose a price condition in the permanent certificate (which, as stated, it did only in *Signal*); it may grant the permanent certificate, unconditionally; or it may even refuse a permanent certificate entirely. Thus, the fact that the FPC has included price conditions in temporary certificates is of no significance as respects protection of consumers.

Nor, to our regret, do we feel entitled to infer that the recent imposition of price conditions in temporary certificates presages a change in Commission policy toward untested initial producer rates. The defense offered by the Commission in its brief of its present policy of deferring any consideration of the reasonableness of

[9] 12 P.U.R. 3d 3 (1955).

initial prices to §5 proceedings rules out any such inference, as does a recent holding by the FPC that a producer applicant need not support the reasonableness of its proposed rate. *Middle States Petroleum Corp.*, Docket G-14836, April 13, 1959, *supra*, pp. 2-3.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the defense set forth in the *amicus* brief of the Commission's hands-off policy toward producer initial rates is insubstantial.

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